78-1058

No. 78-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DENIS J. O'CONNELL HIGH SCHOOL, BY ITS BOARD OF TRUSTEES, *Petitioner*,

v.

THE VIRGINIA HIGH SCHOOL LEAGUE, ET AL., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Denis J. O'Connell High School, by its Board of Trustees, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., pp. 1a-13a) is reported at 581 F. 2d 81. The opinion of the district court (App., pp. 14a-19a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1978 (App., p. 20a). A timely petition for rehearing, with a suggestion for rehearing *en banc,* was denied on October 4, 1978 (App., p. 21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a state-supported private unincorporated association which fosters interscholastic athletic competition among students attending public high schools may, without any statutory authority or legitimate reason articulated by a legislative body, terminate the opportunity for children attending a private school to participate in this state-sponsored program on an equal basis.

2. Whether an agency acting under color of state law must adopt a less restrictive alternative before inhibiting or adversely affecting the exercise of the constitutionally protected rights of those who select a private school education.

3. Whether an appellate tribunal may substitute its judgment with respect to findings of fact by a district court, or whether its role in constitutional adjudication is more narrowly limited to correcting erroneous conclusions of law and "clearly erroneous" findings of fact.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner is a state-accredited private nonprofit high school owned by the Roman Catholic Bishop of Arlington, Virginia, and operated by a board of trustees equally composed of Catholic pastors and laymen from participating parishes. It has approximately 1,600 students, most of whom are Roman Catholics and many of whom participate in athletic and extracurricular activities. (Jt. App. 7, 15, 30-31).[1]

[1] "Jt. App." refers to the joint appendix filed in the court of appeals.

Respondent, Virginia High School League (hereinafter "the League") is a private unincorporated association sponsored by the University of Virginia, and maintained by public funds. (App. 2a, 15a).

In February 1977, petitioner applied to respondent for membership (App. A, *infra,* p. 1a). Respondent denied the application because of Section 8-1-1 of its governing constitution (App. A, *infra,* p. 1a), which limits membership to "accredited state public high schools in Virginia." Respondent voluntarily permits nonpublic schools such as petitioner to participate in certain of respondent's athletic and literary contests (App. A, *infra,* p. 1a). But, as a result of respondent's exclusionary practices, petitioner and its students is prohibited from participating in League sponsored football, baseball, and basketball events (App. B, *infra,* p. 14a).

Petitioner filed this action under 42 U.S.C. 1983 in the United States District Court for the Eastern District of Virginia seeking injunctive relief on the ground, *inter alia,* that the exclusion of petitioner from membership in respondent, and the consequent inability of petitioner and its students to participate in certain athletic events sponsored by respondent, constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. After respondent's motion for a summary judgment was denied, the case was tried without a jury. The district court granted relief to petitioner.

It is also stipulated that when respondent was originally founded in 1913, its membership included both public and nonpublic secondary schools without difference or distinction (Jt. App. 32). Indeed, an early

publication of the Virginia High School Literary and Athletic League, as respondent was then known, stated: "We earnestly hope that every secondary school in Virginia whether public or private will become a member of the League." But in 1925, respondent's constitution was amended so that only public high schools could be members (Jt. App. 32); the eligibility requirements have remained essentially unchanged since then.

At the trial, respondent pointed to no historical record or other contemporaneous explanation of the purpose of or reason for this change in eligibility requirements. Indeed, when asked at trial to give the historical explanation for the decision to exclude nonpublic schools, respondent's Executive Secretary testified that "as far as I know, (it) was by evolution, there was never anything by design to prohibit schools from being part of any championship, that's just the way it was" (Tr. 88).[2]

Elsewhere in the testimony, an officer of respondent testified (Tr. 66) that "a number of our rules deal with the geographic area from which to take students. It is our understanding that the nonpublic schools in the state do not have a similar geographic area but can draw from an unlimited area." The officer explained that it was not that these geographic differences would give nonpublic schools "an undue advantage" (Tr. 66-67), but simply that "it is difficult for us to administer our rules to schools that have no defined geographic area" (Tr. 67).

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[2] "Tr." refers to the transcript of the trial according to the pagination of the Joint Appendix.

Petitioner filed this action under 42 U.S.C. 1983 in the United States District Court for the Eastern District of Virginia seeking injunctive relief on the ground, *inter alia,* that the exclusion of petitioner from membership in the League, and the consequent inability of petitioner and its students to participate in certain athletic events sponsored by respondent, constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. After respondent's motion for a summary judgment was denied, the case was tried without a jury. The district court granted relief to petitioner, holding that the exclusion of petitioner from membership in the League and from participation in League sponsored athletic events constituted a denial of the equal protection of the laws.

Regarding respondent's asserted justifications for the exclusionary rule, the district court found that "(n)either assertion is supported by the record—and no reason was suggested why (respondent's) rules could not be uniformly applied to both private and public high schools." On the basis of the evidence at trial, the district court found "that (respondent) has failed to establish a rational basis for limiting * * * membership to public high schools" (App. 17a). Noting, moreover, that petitioner is a "well known Northern Virginia Catholic-supported institution", the district court also found that "the record made here clearly supports the inference that it was denied membership in the League solely on the basis of its status as a private sectarian high school" (App. 19a). As a matter of law, the district court rejected respondent's contention that admission of petitioner to the League would violate the Establishment Clause of the First Amendment. (App. 17a-19a) (citing *Wolman* v. *Walter*, 433 U.S. 229, 262 (1977), Powell, J., concurring).

On appeal, the court of appeals reversed in a 2-1 decision. The court of appeals agreed with the district court that petitioner's claim was cognizable under 42 U.S.C. 1983, that is, that petitioner had raised a non-frivolous challenge to an exclusionary practice that was subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment (App. 5a). But the court of appeals upheld the practice, finding "that the classification challenged is rationally related to a legitimate State objective * * *" (App. 12a).

In adjudicating the constitutionality of respondent's exclusionary practice, the court of appeals relied on the "conceivable basis" test announced by this Court in *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961), that is, that "a statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it" (App. 10a). Applying this standard, the court of appeals asserted a speculative and hypothetical justification for the Exclusionary rule, as to which there was neither evidence in the record nor briefing nor argument on appeal, viz., that "private schools can draw students from a larger geographical area than public schools" (App. 10a). Secondly, the court of appeals set aside the district court's finding that the alleged difficulty in administration of the respondent's "transfer rule"[3] was "not supported by the record" (App. 10a-11a, but see App. 17a). The court of appeals rested its judgment on the equal protection claim and did not reach respondent's contention that "the admis-

[3] This rule of the League states, essentially, that when a student transfers from one high school to another without a corresponding change in district residence by his parents, the student is ineligible to participate in interscholastic competition for one semester at his new school (App. 10a).

sion of a private sectarian school such as O'Connell would violate the Establishment Clause" (App. 12a).

REASONS FOR GRANTING THE PETITION

I. This Case Affords An Excellent Opportunity For This Court To Provide Needed Guidance On The Appropriate Standard Of Review In Equal Protection Analysis

The court of appeals here endorsed and applied a standard of review under which "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." It is petitioner's contention that the application of this most extreme formulation of the "rational basis" test is inappropriate in this case. Whereas this standard typically has been applied to statutory classifications affecting economic interests alone,[4] this is not such a case. A more substantial standard of review is appropriate here, and under such a standard, the discrimination at issue cannot be sustained on the present record.

This case, then, presents an issue concerning the proper standard of judicial review under the Equal Protection Clause. The issue is important and of general significance, for this area of the law is in a confusing state of flux. On numerous occasions over the last several years, members of this Court have indicated dissatisfaction with a rigid two-tier model of

[4] See, e.g., *Idaho State Dept. of Employment* v. *Smith*, 434 U.S. 100 (1977); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *New Orleans* v. *Duke*, 427 U.S. 297 (1976); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *U.S.* v. *Carolene Products*, 304 U.S. 144 (1938); and see McCloskey, "*Economic Due Process* and the Supreme Court: An Exhumation and Reburial", 1962 Sup. Ct. Rev. 34.

equal protection analysis.[5] Indeed, for certain types of cases, it is plain that this Court has adopted an intermediate standard of review.[6] Lower courts and state courts,[7] as well as legal commentators,[8] also have begun to propose alternatives. This case presents an excellent opportunity for further needed guidance from this Court in this area.

The "any conceivable basis" test articulated in *McGowan* v. *Maryland, supra.*, is an inappropriate standard of review in this case for two reasons. First, the exclusion at issue affects not merely economic interests, for which the *McGowan* test normally is considered appropriate, but rather the right to attend private schools, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). This Court has acknowledged a basis for the *Pierce* right both in the notion that parental freedom of educational choice is an aspect of the constitutionally protected right to privacy[9] and in the protection

[5] See, e.g., *Schlesinger* v. *Ballard*, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting); *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 98-110 (1973), (Marshall, J., dissenting).

[6] See, e.g., *Craig* v. *Boren*, 429 U.S. 190 (1976); *Matthews* v. *Lucas*, 427 U.S. 495 (1976); *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *McGinnis* v. *Royster*, 410 U.S. 263 (1973); *James* v. *Strange*, 407 U.S. 128 (1972); *Reed* v. *Reed*, 404 U.S. 71 (1971).

[7] See, e.g., *Hawkins* v. *San Francisco Superior Court*, 22 Cal. 3d 584, —— (1978) (Mosk, J., concurring).

[8] See, e.g., Gunther, "Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", 86 Harv. L. Rev. 1 (1972).

[9] See, e.g., *Roe* v. *Wade*, 410 U.S. 113, 153 (1972); *Griswold* v. *Connecticut*, 381 U.S. 480, 482 (1965); see also Arons, "The Separation of School and State: *Pierce* Reconsidered", 46 Harv. Ed. Rev. 76 (1976); T. Emerson, The System of *Freedom of Expression*, 598-600 (1970).

afforded by the Free Exercise Clause of the First Amendment to those, who like the parents involved in the instant case, ground their decision to send their children to a church-related school in religious motivations and concerns.[10] The exclusion of petitioner and its students from participation on an equal basis in certain atheltic events with public schools and their students constitutes a penalty on the exercise of the *Pierce* right, which should not be tolerated, absent a showing of a countervailing compelling state interest or that classification which has the effect of excluding persons from a generalized welfare benefit is necessary to achieve the purposes professed. *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963). A state should not be allowed to penalize the *Pierce* right gratuitously or without any reasonable basis articulated in advance of litigation. *Zablocki* v. *Redhail,* 434 U.S. 374 (1978); *Craig* v. *Boren, supra; Weinberger* v. *Wiesenfeld, supra; Eisenstadt* v. *Baird,* 405 U.S. 438 (1972).

Second, the rational basis test as explained in *McGowan,* by its terms, is applicable to "a *statutory* discrimination" (366 U.S. at 426; emphasis added). As the court of appeals in the instant case stated, "to determine the validity of state *legislation",* one must ask "whether the *statutory classification* bears some rational relationship to a legitimate state purpose". (App. 5a; emphasis added). The exclusion at issue

[10] In *Wisconsin* v. *Yoder,* 406 U.S. 205, 233 (1972), Mr. Chief Justice Burger wrote:

> "However read, the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim . . . , more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State—requirement under the First Amendment."

here, however, is not the product of statute. The parties stipulated in this case (Jt. App. 31-32, 33) that respondent was publicly funded and acting under color of state law, but that "it is not an agent of the State of Virginia * * *; that there is no requirement under the (state) Code that (respondent) exist; and that no powers, duties and authorities for (respondent) are derived directly from said Code * * *." Respondent is an unincorporated association of public high school officials, which receives public monies, but otherwise is essentially a private organization. It receives no delegation of authority from the state government and is not answerable to the state.

Whereas the judicial deference afforded legislative and executive judgments by the "any conceivable basis" test may be appropriate in that context, such deference is not appropriate in the circumstances here. Respondent is basically a publicly funded club, answerable to no one but its members. In that context, a court need not indulge in the broad presumption of validity that it would were it adjudicating the constitutionality of a statute or regulation.[11]

In any event, federal courts should not defer to respondent's exclusion of private schools on the basis of any "conceivable" rationalization, as the court of appeals did here. To the contrary, it is appropriate for a court to eschew such hypothesization and to require

[11] Even if the rules of the League had been enacted by the Virginia legislature, this Court as recently as last term has indicated that special judicial sensitivity is appropriate where members of a religious group are adversely affected. See *Regents of Univ. of California* v. *Bakke,* 438 U.S. ——, 98 S. Ct. 2733, 2749-2750 (1978) (Opinion of Powell, J.). See also *U.S.* v. *Carolene Products,* 304 U.S. 144 (see footnote 4).

that the decisionmaker show that it has made a "considered evaluation of the relative desirability" of its decision, *Hampton* v. *Mow Sun Wong,* 426 U.S. 88 (1976), and that this decision is reasonable in the sense that the classification scheme must serve important governmental objectives and must be substantially related to achievement of those objectives. *Craig* v. *Boren, supra.* If such a standard is required to protect the right of young males in Oklahoma to be treated the same as females with respect to the legality of their consumption of "near-beer", no less demanding a standard should be applied here to protect the *Pierce* rights affected by respondent's Exclusionary rules.

Respondent has so far failed to meet the burden of any of the tests discussed above. It has not argued that its transfer rule is a "compelling state interest".

It is dubious as a matter of law whether mere administrative convenience suffices as a permissible rational for the kind of discrimination involved in this case. See, e.g., *Trimble* v. *Gordon,* 430 U.S. 762 (1977); *Stanley* v. *Illinois,* 405 U.S. 645 (1972). In any event, however, it is highly significant that the district court, which had the opportunity to assess the credibility of these officials under cross-examination (Tr. 69-70, 80-81), rejected both of the reasons asserted by these officials to justify the League's exclusionary rule as unsupported by the record below (App. 17a).

Where, as here, the exercise of a recognized right has been penalized by a group that is not answerable or responsible to the political process, more than the inconclusive *ex post facto* hypothesization that respondent relies on here should be required by a court. In such case, a count should invalidate the exclusionary

rule unless and until the appropriate decision-making body makes a considered evaluation of the rule and, if the rule is reaffirmed, gives a stated justification that is reasonable.

II. This Case Affords An Opportunity For This Court To Clarify The Applicability Of The "Least Restrictive Alternative" Standard To Cases Of This Nature.

In *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951), this Court invalidated under the Commerce Clause, an ordinance which had the affect of inhibiting competition in the sale of milk by out-of-state producers, because "reasonable and adequate alternatives (were) available." This rationale has also been applied to cases involving fundamental personal rights; see, e.g., *Sherbert* v. *Verner,* 374 U.S. 398, 407 (1963); *Shelton* v. *Tucker,* 364 U.S. 479, 487-490 (1960); *Talley* v. *California,* 362 U.S. 60, 64 (1960); and see *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967).

Following the practice suggested by this Court in *Dean Milk,* the district court suggested several reasonable, less burdensome alternatives to total exclusion of petitioner from the League that would still enable respondent to enforce its articulated goals (Tr. 98, 107). And it made findings that "no reason was suggested why the League's rules could not be uniformly applied to both private and public high schools." (A. 17a). The Fourth Circuit ignored this Court's teaching in *Dean Milk* and its progeny when it stated cavalierly: "Also inconsequential is the fact that there may be means of addressing the problem other than by blanket exclusion of private schools which may result in less hardship to students at private schools such as O'Connell." (A. 13a). The Fourth Circuit clearly does not

appreciate either this Court's teaching on less restrictive alternatives or the obvious implications of this doctrine for equal protection analysis based on scrutiny of the fit between actual ends and the means chosen to implement those goals. For this reason the writ should issue in this case.

III. This Case Affords An Opportunity For This Court To Articulate The Appropriate Roles For Fact-Finders And Appellate Tribunals In Constitutional Adjudication.

An integral part of the genius of the common law has been the interaction of law and facts in the assertion of rules governing society. O. Holmes, *The Common Law* (1890). In cases such as the instant case, where an equitable claim is presented, the role of the judge as fact-finder is paramount and his findings are to be set aside on appeal only if "clearly erroneous." F.R. Civ. P. 52(a). This Court has recently given increased significance to the role of juries as an indication of local community standards, even where First Amendment rights might be implicated. See, e.g., *Miller* v. *California,* 413 U.S. 15 (1973).

The importance of the fact-finder in constitutional adjudication is jeopardized if the decision of the court of appeals is allowed to stand, for the appellate court substituted its own speculation and hypothesizing where the record was unable to support a plausible reason on behalf of the League's Exclusionary rule. (Contrast App. 17a and 19a with App. 10a-11a).

The dissenting judge in the court of appeals stated: "There is ample evidence to support the district court's determination that the League's asserted justifications for excluding private and parochial schools lack a factual foundation. Since this finding is not clearly erroneous, it is clearly binding on use." (App. 12a). Most circuits understand the importance of Rule 52(a), F.R. Civ. P., in constitutional adjudication and abide by its teaching. Some circuits, however, have misconstrued dicta opinions of this Court, *Jacobellis* v. *Ohio,* 378 U.S. 184, 189 (1964), and *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963), as warrant for virtual de novo trials at the appellate level. Contrast *Guzick* v. *Drebas,* 431 F. 2d 594 (6th Cir. 1970), cert. denied, 401 U.S. 948 (1971) and *Fritz* v. *Jarecki,* 189 F. 2d 445 (7th Cir. 1951), with *Joyce* v. *Davis,* 539 F. 2d 1262 (10th Cir. 1976); *Lindsay* v. *McDonnell Douglas Aircraft Corp.,* 485 F. 2d 1288 (8th Cir. 1973); *Case* v. *Morissette,* 155 U.S. App. D. C. 31, 475 F. 2d 1300 (1973); *W. S. Shanban* v. *Commerce and Industry Ins. Co.,* 475 F. 2d 34 (9th Cir. 1973).

This Court should grant the petition for certiorari in the instant case both to resolve the apparent conflict among the circuits concerning Rule 52(a), F.R. Civ. P., and to articulate its own teaching concerning the appropriate role of the fact-finder, whether judge or jury, in constitutional adjudication. It is especially important for this Court to enforce its views in the context of a case where an inferior tribunal relied on the "conceivable basis" standard in its equal protection analysis.

CONCLUSION

In seeking review of the judgment below, petitioner does not ask this Court to engage in an independent appraisal of the legitimacy of the ends or purposes articulated by a state legislature. Indeed, that is not possible here, for the action challenged is a by-law of a

private unincorporated association acting under color of state law by virtue of state involvement and support. We merely urge that, where a state lends its official support to a private association carrying out a policy the effect of which is discriminatory and where there is little realistic opportunity for effective redress of grievance through the political processes normally intended to safeguard the rights of minorities, courts should scrutinize state-supported discriminatory classifications with great care.

Petitioner contends that the instant case demonstrates that the "conceivable basis" standard for equal protection analysis is outmoded and ineffectual to safeguard adequately the guarantees of the Equal Protection Clause. In the light of a growing consensus among members of this Court, minimal scrutiny analysis should be confined to the examination of the fit between the means chosen by the government to implement actual, articulated purposes for which there is believable evidence, not hypothetical, judicially imagined ones without support in the record developed by the trial court.

In any event, even if a majority of this Court were to prefer to preserve the vitality of the "conceivable basis" test announced in *McGowan* as an appropriate vehicle for the disposition of some equal protection claims, it is clearly inappropriate in the instant case, which involves an invidious discrimination which has the effect of penalizing persons for exercising their constitutionality protected right of freedom to choose an education and which raises the question of the application of the less restrictive alternative standard to cases involving significant personal rights protected by the constitution.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS.
FOURTH CIRCUIT.

No. 78-1064.

DENIS J. O'CONNELL HIGH SCHOOL
by its Board of Trustees, *Appellee*,

v.

THE VIRGINIA HIGH SCHOOL LEAGUE ET AL., *Appellants*.

Argued March 8, 1978.

Decided Aug. 7, 1978.

* * * * * * * * * *

John A. Dezio, Charlottesville, Va., for appellants.

William G. McMurtrie, Falls Church, Va., for appellee.

Before BUTZNER, RUSSELL and WIDENER, Circuit Judges.

DONALD RUSSELL, Circuit Judge:

The Virginia High School League (the League) appeals from a judgment of the District Court enjoining the League from denying Denis J. O'Connell High School's (O'Connell) application for membership in the League and from barring O'Connell from competing in League-sponsored championship athletic contests.

O'Connell is a state-accredited private non-profit Catholic high school located in Arlington County, Virginia. In February of 1977, O'Connell applied for admission to the Virginia High School League, Northern Region. The application was denied because the League's Constitution limits membership to public high schools.[1]

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[1] Section 8 (Membership) of the present League Constitution provides, in relevant part:

"8-1-1 Eligibility-Accredited state public high schools in Virginia shall be eligible for membership in the League. Membership shall be renewable annually."

The League is an unincorporated association of public high schools in Virginia under the sponsorship of the School of Continuing Education of the University of Virginia. With only one exception, every public high school in Virginia belongs to the League. In 1913 when the League was founded, its Constitution included both public and private secondary schools without distinction, but in 1925 the Constitution was changed so that only public high schools could be members, and that limitation remains today. The League is maintained by public funds derived in part from the University of Virginia, in part from local school boards, and in part from gate receipts from League-sponsored tournaments.

The League regulates, controls, and governs all athletic, literary and debating contests between and among its member schools. Private schools are invited by the League to participate as a distinct class in certain statewide tournaments, such as those involving tennis, debating and speaking. However, the private schools are excluded altogether from League sponsored tournaments involving such "major" sports as football, basketball and baseball.

O'Connell brought suit against the League pursuant to Section 1983, 42 U.S.C. and its jurisdictional counterpart, Section 1343(3), 28 U.S.C.,[2] alleging in its complaint that the League's refusal to admit O'Connell on the sole basis that it is a private school is an arbitrary classification in violation of the Equal Protection Clause of the Fourteenth Amendment. The complaint further charged that, as a result of this exclusion, O'Connell's students choice of private education denies them the right to compete on a tournament level in sports such as football, basketball and baseball, thus placing them in a less favorable competitive position than public high school students to receive athletic scholarships, professional bonuses, and other benefits that accrue to gifted athletes. The League submitted an answer denying the essential allegations of the complaint. Following the Court's denial of the League's Motion to Dismiss and Motion for Summary Judgment, the parties entered into a formal stipulation which was filed with the Court prior to trial. The stipulation stated, *inter alia*, that action by the League in supervising interscholastic competition is taken under color of state law and constitutes state action within the meaning of Section 1983, 42 U.S.C.

[2] O'Connell also brought suit under the Sherman Anti-Trust Act, alleging that the 27 Northern Region Principals had engaged in an illegal group boycott of O'Connell by declining to admit it into the League. This claim was abandoned at trial and not raised upon appeal.

At trial, the League presented three basic arguments in defense of its policy of exclusion. First, the League asserted that because O'Connell had not been deprived of any federally protected right, there was no federal question presented so as to support federal jurisdiction alleged to be founded on 28 U.S.C. § 1343. Second, the League argued that its limitation of membership to public schools is rationally related to the League's interest in enforcing its eligibility rules concerning transfer students. The League presented testimony to the effect that, because public schools draw students only from strictly defined zones whereas private schools are not so limited, the League's transfer rules would be difficult to enforce with respect to private schools. Finally, the League argued that the admission of O'Connell, a parochial school, into the League would violate the Establishment Clause of the First Amendment. The Court held that (1) the question whether participation in the League's athletic program can be characterized as a right is not determinative of the Constitutional validity of the League's classification, (2) there is nothing in the record to support the asserted bases for the League's exclusion of private schools from League membership, and (3) the activities of the League neither advances nor inhibit religion, and any financial benefits supplied indirectly by the League to O'Connell in the form of

surplus proceeds from League-sponsored championship games would not constitute excessive governmental entanglement with religion so as to violate the Establishment Clause. Thus, because the exclusion of O'Connell from the League lacked a rational basis in violation of the Fourteenth Amendment, and because the inclusion of O'Connell in the League would not violate the First Amendment, the Court enjoined the League from denying O'Connell membership.

On appeal, the League first contends that the District Court erred in holding that jurisdiction exists under 28 U.S.C. § 1343. Section 1343 grants a District Court jurisdiction to redress a deprivation, under color of state law, of a right or privilege secured by the Constitution or federal law. The League's contention is essentially as follows: Since neither education, nor participation in interscholastic competition, nor the speculative possibility of acquiring an athletic scholarship, professional bonus or other emolument are rights secured by the Constitution or federal law, 28 U.S.C. § 1343 did not provide the District Court with jurisdiction over O'Connell's claim. Admittedly, education is not a fundamental right under the Constitution, *San Antonio Independent School District v. Rodriguez* (1973), 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16, and, of course, neither is participation in interscholastic athletics such a right. *Mitchell v. Louisiana High School Athletic Association* (5th Cir. 1970), 430 F.2d 1155, 1158. Nor is the speculative possibility of acquiring an athletic scholarship or professional bonus a federally protected property right. *Parish v. National Collegiate Athletic Association* (5th Cir. 1975), 506 F.2d 1028, 1034, n. 17. The right allegedly abridged, however, is not the right to education or the right to participate in interscholastic athletics; rather, the alleged abridgement is of the right of private school students to be treated similarly as public school students with regard to participation in interscholastic athletics where there is no rational basis for treating the two classes of

students differently. That is, O'Connell claims that its students have been denied their right to an equal opportunity to compete in interscholastic competition. A claimed denial of equal protection by state action arises under the Constitution and would normally be within the District Court's jurisdiction under Section 1343, unless unsubstantial or frivolous. *Baker v. Carr* (1962), 369 U.S. 186, 199, 82 S.Ct. 691, 7 L.Ed.2d 663; *Mitchell v. Louisiana High School Athletic Association, supra,* 430 F.2d at 1158. Under the facts of the present case, we cannot say that the claimed denial of equal protection lacks substance. Therefore, the District Court properly took jurisdiction of the claim pursuant to 28 U.SC.. § 1343.[3]

The League next contends that the District Court erred in holding that there is no rational basis for the provision of the League's Constitution limiting membership to public schools. We agree.

Where, as here, there is no fundamental right or suspect classification involved, the test to determine the validity of state legislation is whether the statutory classification bears some rational relationship to a legitimate state purpose. *San Antonio Independent School District v. Rodriguez, supra,* 411 U.S. at 17, 93 S.Ct. 1278; *Weber v. Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, 172, 92 S.Ct. 1400, 31 L.Ed.2d 768; *See generally Developments in the Law—Equal Protection,* 82 *Harv.L.Rev.* 1065, 1076-1087 (1969). Furthermore, "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland* (1961), 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1105, 6 L.Ed.2d 393.

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[3] *See Chabert v. Louisiana High School Athletic Association* (La. App. 1975), 312 So.2d 343, *aff'd,* 323 So.2d 774 (La. 1975).

The reasons for the League's exclusion of private schools, as established by the statements of two League officials, are as follows: (1) League regulations are not sufficiently defined to determine the area from which private schools, many of which may now draw students from an unlimited geographical area, may draw eligible participants for League activities; (2) the lack of an attendance zone for private schools similar to that of public schools, each of which may draw students only from a specified geographical area, would make the transfer rule difficult to enforce and would give private school students an advantage not enjoyed by public school students; (3) students eligible to attend private schools could choose to attend private schools or their public school on the basis of athletic programs in violation of the spirit of the League. The transfer rule cited by the League officials states, essentially, that when a student transfers from one high school to another without a corresponding change in district residence by his parents, the student is ineligible to participate in interscholastic competition for one semester at his new school.

In its Memorandum Opinion, the District Court stated that "[t]he only bases asserted by the League for excluding non-public high schools from League membership are their ability to draw students from a larger geographical area than the public high schools and the difficulty of enforcing the eligibility rules for transfer students." The Court found that "[n]either assertion is supported by the record—and no reason was suggested why the League's rules could not be uniformly applied to both private and public high schools."

The Court's finding that there is no support in the record for the League's contention that private schools can draw students from a larger geographical area than public schools is based upon the failure of the League to introduce actual evidence to that effect. However, it is well-

known that many private schools in Virginia suffer no geographical limitation with respect to the areas from which they may draw students. Furthermore, even assuming that there are some Virginia private schools which do draw from strictly defined areas, these schools unlike their public counterparts, are not so limited by state law and could therefore at any time decide to modify or abolish their self-imposed drawing restrictions and recruit students from anywhere. And even assuming that some of these schools chose to continue drawing from strictly defined areas—an assumption the League is no obligated to make—these areas would overlap with the areas from which public schools can draw. Therefore, because the actual and potential disparity in drawing area between public schools and private schools is beyond doubt, the District Court should have given credence to the League's assertion that public and private schools lack similar attendance zones.

Given the lack of specifically defined drawing areas with respect to many private schools, it is obvious that the admission into the League of private schools would create difficulties in the enforcement of the transfer rule. Although the difficulty of applying the rule to students transferring from private to public schools might not be affected,[4] surely additional difficulties would arise in applying the rule to students transferring from either private or public schools to "zoneless" private schools. Since the school to which the student transfers would be lacking a district in which his parents could establish residence, it

[4] A Note to § 28-6-2 of the Rules and Regulations of the League provides that the Transfer Rule applies equally "to a transfer from a private school to a public school as to a transfer from one public school to another." Thus, whether or not private schools become League members, the parents of a student transferring from a private to a public school would presumably need to reside in the public school district following their child's transfer in order for the child to be immediately eligible to participate in the public school's athletic programs.

would seem that any student transferring to a "zoneless" private school would necessarily be ineligible to participate in that school's athletic programs for one semester—even if his parents moved next door to the school. Thus, any student transferring to a "zoneless" private school would be victimized by the application of the transfer rule to a situation that it was never meant to cover.

In addition to the problems created by the application of the transfer rule to private schools lacking attendance zones, the League asserted another basis, apparently ignored by the District Court, for restricting its membership to public schools. A League official stated that if private schools became members, students eligible to attend such private schools could choose to attend those schools or their public school on the basis of athletic programs "in violation of the spirit of the League." Although thtre was no elaboration by the League official as to exactly what this "spirit" is, an examination of the League Constitution and the League Rules and Regulations shows that the placing of great emphasis by a student upon athletic programs in deciding what school to attend does indeed violate "the spirit of the League." Section 6 of the League Constitution states that the object of the League is "to foster among the public high schools of Virginia a broad program of supervised competitions and desirable school activities *as an aid in the total education of pupils.*" (emphasis added) Rules and Regulations Section 26-1-1 states that their purpose is "*to protect and preserve the educational values inherent in* [*interschool*] *activities.*" (emphasis added) Obviously, the transfer of a student from one school to another solely to participate on the athletic teams of the latter school does not come within the "spirit" of these two sections. More specifically, Section 27-10-1 (Proselyting Rules) states: "*No member school or group of individuals representing the school shall subject a student from another school to undue influence by encouraging him to transfer from one school to another for League activities.*"

(emphasis in text) And Section 28-8-3(8) states that "[a]ny student who accepts material or financial inducement to attend a school for the purpose of engaging in athletics, regardless of the source of that material or financial inducement, shall be ineligible" to represent his school in any interschool athletic contest. The sections quoted above serve to illustrate the League's concern that students not be subjected to pressures by coaches, fan and other interested parties to attend one school over another. And, of course, the objective of the transfer rule, which makes a student ineligible to compete for one semester where his move to a new school is not accompanied by a corresponding change in residence by his parents, is basically the same—to deter those who would pressure a student to transfer and to deter the student from succumbing to such pressures by preventing him from becoming immediately eligible to compete at his new school.

The concerns addressed by the above mentioned sections have been recognized by other courts as problems that need to be addressed. In rejecting an attack upon the constitutional validity of a transfer rule imposed by the Louisiana High School Athletic Association, a federal District Court stated that "[t]he transfer rule was adopted to prevent recruiting of school children by overzealous athletic coaches, fans, and school faculty. . . . All parties to this suit agree that this sort of recruiting of school children to engage in athletic competition may be considered harmful by the state, and that it may take steps to prevent this harm." *Walsh v. Louisiana High School Athletic Ass'n.* (E.D.La. 1977), 428 F.Supp. 1261, 1264. In another case involving a challenge to the application of a transfer rule, the Louisiana Court of Appeals stated:

> "Past history, and especially recent events, have shown the unconscionable actions to which some individuals will resort in order to insure themselves of a superior athletic program. Illegal recruiting of promis-

> ing young athletes is the gravamen of this recurring problem. Not only is the atmosphere of fair competition irreparably clouded, but many times the lives of the athletes themselves in that athletics becomes primary and academicism secondary under the overbearing scrutiny of those who would entice through illicit means. It is unarguable that any state has an interest in prohibiting such occurrences in its high schools. One means towards such a prohibition is to impede those who would be the innocent objects of illegality from being immediately profitable to the perpetrators. Certainly the advantages of such undisciplined activity are considerably lessened by the application of the rule complained of herein." *Chabert v. Louisiana High School Athletic Association* (La.App. 1975), 312 So.2d 343, 346.

The language of these two cases makes it clear that the State is justified in taking any reasonable step to prevent actual or potential abuse of student athletes by those persons who would recruit these students for their athletic ability. Certainly, therefore, reasonable measures taken to reduce or remove the possible temptation to make a choice of schools on the basis of their respective athletic programs are justified.

At present a student who desires to engage in League-sponsored tournaments is not exposed to a potentially tempting choice of schools; of the public schools, he is usually eligible to attend only the one serving the district in which he lives, and private schools are ineligible for League tournament competition. If, however, private schools were admitted to the League, a student eligible to attend such schools could choose to attend any of them or to attend his public school, thus exposing himself to the potential pressures that the League seeks to forestall, and perhaps basing his ultimate choice on athletic considerations in violation of the above mentioned "League spirit."

Nor would the transfer rule be effective to deal with such a situation, for that rule applies only to transfers from one secondary school to another, and not to the initial choice of a secondary school. Moreover, the transfer rule would also be inadequate to deal with the situation where a student's residence falls within the district of a private school as well as that of his public school. In such a case the student could presumably transfer back and forth between the two schools without suffering any ineligibility—again, exposing himself to those pressures—and temptations against which the League attempts to protect its students.

Against this background, the League's exclusion of private schools must be viewed as one of several reasonable steps taken to combat the serious problem of adolescent students being subjected to and perhaps succumbing to pressures to attend one school over another on the basis of athletic considerations. That there was no evidence presented to establish the existence of such a problem in Virginia is not important, for not only do several provisions of the League's Constitution and Rules and Regulations show clearly the League's concern with the possible occurrence of such activities, but experience elsewhere has shown that this is indeed a problem which needs to be addressed.[5] And "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[6]

Also inconsequential is the fact that there may be means of addressing the problem other than by blanket exclusion of private schools which may result in less hardship to students at private schools such as O'Connell. The task of the courts in passing on the validity of a classification under the standard Equal Protection test is not to de-

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[5] *Walsh, supra,* 428 F.Supp. 1261.

[6] *McGowan v. Maryland, supra,* 366 U.S. at 426, 81 S.Ct. at 1105.

termine if it is the best way, or even a good way, of accomplishing a legitimate state objective. Our task is only to determine whether the classification makes sense in light of the purpose sought to be achieved; beyond that point the wisdom of the State must be allowed to prevail. Having found that the classification here challenged is rationally related to a legitimate State objective, this Court has completed its consideration of the matter.

Because we find that the League may constitutionally exclude private schools from League membership, we do not address League arguments concerning burden of proof, nor do we address the League contention that the admission of a private sectarian school such as O'Connell would violate the Establishment Clause of the First Amendment.

Accordingly, the judgment below is reversed.

REVERSED.

BUTZNER, Circuit Judge, dissenting:

I agree that the district court properly took jurisdiction in this case, but I would affirm the judgment.

Denis J. O'Connell High School brought this action because its exclusion from the Virginia High School League handicaps its students who compete for athletic scholarships and other benefits available to talented athletes. To explain its exclusion of private and parochial schools, the League cited the ability of these schools to draw students from a wider geographic area than public schools and the difficulty in enforcing the eligibility rules for transfer students.

Quite properly, the district court rejected these arguments. The geographic areas from which public schools draw vary widely in size and population. There is ample evidence to support the district court's determination that the League's asserted justifications for excluding private and parochial schools lack a factual foundation. Since this

finding is not clearly erroneous, it is binding on us. Fed. R.Civ.P. 52(a).

Moreover, the cases cited to support the League's policy concern no-transfer rules within an association including public, private, and parochial schools. *See Walsh v. Louisiana High School Athletic Ass'n.*, 428 F.Supp. 1261 (E.D. La.1977); *Chabert v. Louisiana High School Athletic Ass'n.*, 312 So.2d 343 (La.App.), *aff'd* 323 So.2d 774 (La.1975). No case approving a policy excluding non-public schools from an athletic association has been cited. The fact that the Louisiana association operates and enforces a no-transfer rule successfully without excluding private and parochial schools belies the League's argument.

Because the record discloses no factual basis for concluding that the League's exclusionary rule bears some rational relationship to the state's purpose, I am persuaded that the district court correctly decided that the rule violated the equal protection clause. *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 40, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973). The district court also properly held that admission of Denis J. O'Connell High School to the League would not violate the establishment clause of the first amendment. *See Wolman v. Walter*, 433 U.S. 229, 235-36, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977). Consequently, I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 77-412-A

BISHOP DENIS J. O'CONNELL HIGH SCHOOL, ETC.,
Plaintiff

v.

THE VIRGINIA HIGH SCHOOL LEAGUE, ET AL., *Defendants*

MEMORANDUM OPINION

The plaintiff, Bishop Denis J. O'Connell High School, brought this suit against The Virginia High School League and the named high school principals for damages and injunctive relief under 15 U.S.C. § 1 and 42 U.S.C. § 1983.

O'Connell claims that the League has unlawfully prohibited its students from participating in League-sponsored district, regional and state championships in those sports which draw large gate receipts and public recognition solely on the basis of its status as a private sectarian high school.

The high school principals have been dropped as party defendants and the Sherman Act claim has been abandoned.

Jurisdiction and venue are not questioned, and the League now concedes that its actions in the premises were taken under color of state law within the meaning of 42 U.S.C. § 1983.

The material facts are not in dispute—most were stipulated.

The Bishop Denis J. O'Connell High School is a state-accredited private non-profit Catholic high school located in Arlington County, Virginia, consisting of some 1,600 students, most of whom are Roman Catholics.

O'Connell applied for admission to The Virginia High School League, Northern Region, in February of 1977. The application was denied because the League's constitution limits membership to public schools.

Membership in the League originally included both public and private secondary high schools—Membership since 1925 has been limited to public schools.

The Virginia High School League is an unincorporated association of public high schools in the Commonwealth of Virginia under the sponsorship of the School of Continuing Education of the University of Virginia.

The League is maintained by public funds derived in part from the University of Virginia, in part from local school boards, and in part from gate receipts from League-sponsored district, regional and state athletic tournaments.

It regulates, governs and controls all athletic, literary and debating contests between and among its member schools—It permits non-public schools to compete on an equal basis with public schools in certain sports and literary contests for statewide prizes, but prohibits them from competing in League-sponsored championship football, basketball and baseball games.

O'Connell claims that its exclusion from League membership places its students who have chosen a non-public school education in a less favorable position than those who have chosen a public school education to receive athletic scholarships and the other benefits that accrue to gifted athletes, and that the League's distinction between public and non-public schools constitutes an arbitrary classification violative of the Equal Protection Clause of the Fourteenth Amendment.

Tournament competition is the lifeblood of gifted athletes—Barring O'Connell from competing in League-sponsored championship games denies its students the equal protection of the laws.

Athletics were recognized as part of the educational process and were subject to the Equal Protection Clause of the Civil Rights Acts. See 15 Am.Jr.2d § 88 and the cases cited in fn. 48.

The League argues that O'Connell has not been deprived of any federally protected right and that a rational basis exists for limiting its memberships to public schools.

The question of whether participation in the Virginia high school athletic program can be characterized as a right is not determinative of the validity of the League's classification. See Graham v. Richardson. 403 U.S. 365, 374 (1971).

Having been duly licensed and accredited by the State of Virginia, O'Connell cannot be denied benefits granted other Virginia schools unless the classification upon which the denial is based is founded upon some difference rationally related to a legitimate government interest.

The only bases asserted by the League for excluding non-public high schools from League membership are their ability to draw students from a larger geographical area than the public high schools and the difficulty of enforcing the eligibility rules for transfer students.

Neither assertion is supported by the record—and no reason was suggested why the League's rules could not be uniformly applied to both private and public high schools.

Therefore this Court finds that the League has failed to establish a rational basis for limiting League membersaip to public high schools.

Although not asserted in its answer or motion to dismiss, the League now argues that the admission of O'Connell would violate the Establishment Clause of the First Amendment to the Constitution of the United States.

This belated argument is without support in fact or law.

The Virginia High School League was created solely for the purpose of fostering among the public high schools of Virginia a broad program of supervised competitions and desirable school activities as an aid in the total education of pupils—Its activities neither advance nor inhibit religion.

Notre Dame and other nationally known Catholic schools have long competed with the United States military academies and many state universities and has shared in the gate receipts and other benefits derived from such athletic competitions—Many Catholic and other sectarian and private high schools in most of the States compete with the public high schools in state athletic championship contests —and no one, as far as we know, has ever claimed that such competitions are prohibited by the Constitution of the United States.

All athletic contests between high schools, colleges and even in the professional ranks are now conducted without regard to race, creed, color or national origin of the players, coaches and schools.

Practically all of the proceeds from League-sponsored championship games over and above the actual expenses go to maintain the League—Only on rare occasions has the total income been sufficint to permit a little to trickle down to the participating schools.

Even though the benefits thus supplied indirectly by the League to its members are paid for in part by government funds, such contributions do not foster an excessive governmental entanglement with religion.

As was stated by Mr. Justice Powell in Wolman v. Walter, —— U.S. —— (No. 76-496, June 24, 1977):

> ". . . This Court [Supreme Court of the United States] has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them."

The Bishop Denis J. O'Connell High School is a well known Northern Virginia Catholic-supported institution—and the record here made clearly supports the inference that it was denied membership in the League solely on the basis of its status as a private sectarian high school. No other reasonable inference is supported by the record, and no other explanation has been offered.

It is conceded that O'Connell otherwise qualifies for membership in the League.

Therefore The Virginia High School League will be enjoined from denying Bishop Denis J. O'Connell High School's application for membership in the League and from barring O'Connell from competing in League-sponsored championship athletic contests.

Counsel for the plaintiff will prepare an appropriate order in accordance with this memorandum opinion, submit is to counsel for the defendant for approval as to form, and then to the Court for entry.

The Clerk will send a copy of this memorandum opinion to all counsel of record.

/s/ ILLEGIBLE

United States Senior District Judge

October 28, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1064

DENIS J. O'CONNELL HIGH SCHOOL,
BY ITS BOARD OF TRUSTEES, *Appellee*,

v.

THE VIRGINIA HIGH SCHOOL LEAGUE; WILLIAM LADSON, PRINCIPAL; R. DON FORD, PRINCIPAL; MS. DORIS TORRICE, PRINCIPAL; THOMAS HYER, PRINCIPAL; EMORY CHESLEY, PRINCIPAL; JAMES G. FINCH, PRINCIPAL; JOHN W. ALWOOD, PRINCIPAL; ROBERT E. PHIPPS, PRINCIPAL; ROY VOLRATH, PRINCIPAL; CLARENCE DRAYER, PRINCIPAL; DR. JAMES WILSON, PRINCIPAL; JOHN T. BROADDUS, PRINCIPAL; RICHARD JOHNSON, PRINCIPAL; AND T. PAGE JOHNSON, PRINCIPAL,
Appellants.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

Filed August 7, 1978.

WILLIAM K. SLATE, II, Clerk.

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1064

DENIS J. O'CONNELL HIGH SCHOOL,
BY ITS BOARD OF TRUSTEES, *Appellee*,

v.

THE VIRGINIA HIGH SCHOOL LEAGUE; WILLIAM LADSON, PRINCIPAL; R. DON FORD, PRINCIPAL; MS. DORIS TORRICE, PRINCIPAL; THOMAS HYER, PRINCIPAL; EMORY CHESLEY, PRINCIPAL; JAMES G. FINCH, PRINCIPAL; JOHN W. ALWOOD, PRINCIPAL; ROBERT E. PHIPPS, PRINCIPAL; ROY VOLRATH, PRINCIPAL; CLARENCE DRAYER, PRINCIPAL; DR. JAMES WILSON, PRINCIPAL; JOHN T. BROADDUS, PRINCIPAL; RICHARD JOHNSON, PRINCIPAL; AND T. PAGE JOHNSON, PRINCIPAL,
Appellants.

Order

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell with the concurrence of Judge Widener. Judge Butzner dissents.

Filed October 4, 1978.

FOR THE COURT,

/s/ WILLIAM K. SLATE, II
Clerk

78-1058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

DENIS J. O'CONNELL HIGH SCHOOL, BY ITS BOARD OF TRUSTEES, *Petitioner,*

v.

THE VIRGINIA HIGH SCHOOL LEAGUE, ET AL., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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THE VIRGINIA HIGH SCHOOL LEAGUE, ET AL., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a), is reported at 581 F.2d 81. The opinion of the district court (App., 14a-19a), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1978 (App., 20a). A timely petition for rehearing, with a suggestion for rehearing en banc, was denied on October 4, 1978 (App., 21a). The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1254(1).

QUESTIONS PRESENTED

1. Whether a state-supported, unincorporated association, which regulates athletic and literary competition between its public high school members, may exclude private high schools from its membership when such exclusion serves to maintain distinct geographical districts for determining eligible participants, in order to facilitate enforcement of transfer rules, and to avoid student selection of schools on the basis of athletic programs in violation of the association's goals.

2. Whether, under established equal protection analysis, a state-supported, unincorporated association must adopt a less restrictive alternative to exclusion of private high schools from its membership.

3. Whether an appellate court may reverse a district court judgment on the basis of "clearly erroneous" findings of fact, when the appellate court determines with certainty, on the basis of the whole record, that a mistake was committed by the district court.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The fourteenth amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizen's of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the *United States Code* provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner's statement of the case is accepted with the following corrections: although nonpublic schools such as the petitioner compete in certain athletic and literary contests with member schools of the respondent League, these contests are not sponsored by the respondent. Only championship games conducted at the state, sectional, regional, and district levels are sponsored by the respondent, and nonpublic schools are excluded from such competition since the respondent's constitution limits membership to public high schools.

The court of appeals asserted a justification for the respondent's exclusionary rule, which was neither "speculative" nor "hypothetical," as claimed by the petitioner. On the contrary, there was evidence in the record to support the appellate court's finding that private schools draw students from a larger geographical area than public schools, and that this disparity would greatly hinder enforcement of various League rules pertaining to eligibility and transfer of participants if private schools were granted membership. (Transcript, 66-67)(App., 6a-7a). In addition, the court of appeals noted that "the actual and potential disparity in drawing area between public schools and private schools is beyond doubt," and that "the District Court should have given credence to the League's

assertion that public and private schools lack similar attendance zones." (App., 7a.)

ARGUMENT

I.

The Respondent's Exclusion Of Nonpublic Schools From Its Membership Does Not Violate The Petitioner's Right To Equal Protection, Since Such Classification Is Rationally Related To The Attainment Of Reasonable State Objectives.

Analysis of Equal Protection claims has evolved, in a long succession of cases brought before this Court, into a two-tiered approach which provides two distinct standards for evaluation of state action. The first of these is the rational basis standard, by which a state need only show some reasonable connection between its policy or action and a legitimate state interest. The more exacting strict scrutiny standard requires a state to justify its classification of the plaintiff by demonstrating that such categorization serves a compelling state interest or objective that could not be met by less restrictive means. The Supreme Court has employed the strict scrutiny standard only if it first found either that a fundamental right was infringed upon, or that a suspect classification was involved. [For "fundamental right" cases, *see, e.g., Roe* v. *Wade,* 410 U.S. 113 (1973) (right of a uniquely private nature); *Bullock* v. *Carter,* 405 U.S. 134 (1972) (right to vote); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) (right of interstate travel). For "suspect classification" cases, *see, e.g., Graham* v. *Richardson,* 403 U.S. 365 (1971) (alienage); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964) (race); *Oyama* v. *California,* 332 U.S. 633 (1948) (ancestry).]

When applied to the petitioner's claim, the well-established two-tiered approach requires application of the rational basis standard to the respondent's membership rule. This is so because this case, as noted by the court of appeals, entails neither a fundamental right nor a suspect classification. (App., 5a.) Education, while recognized as an important service of the state, is not accorded the status of a fundamental right protected by the Constitution. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 35 (1973). Moreover, it has been held in separate cases that neither the participation in interscholastic athletics, nor the speculative possibility of scholarships or professional bonuses is a federally protected right. *Mitchell* v. *Louisiana High School Athletic Association,* 430 F.2d 1155 (5th Cir. 1970); *Parish* v. *National Collegiate Athletic Association,* 506 F.2d 1028 (5th Cir. 1975).

Similarly, the challenged classification of nonpublic schools does not relate to the kind of "discrete and insular" minority which has been required for application of the strict scrutiny standard to suspect classifications. *United States* v. *Carolene Products Co.,* 304 U.S. 144 (1938). The petitioner's claim does not hinge upon a suspect classification, because the class of nonpublic schools "is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez, supra,* at 29. In short, the petitioner's claim that its students have been denied their right to an equal opportunity to compete in interscholastic competition falls within the first "tier" of Equal Protection analysis. As such, the court of appeals correctly employed a rational basis

analysis in deciding the constitutionality of the exclusionary rule. (App., 5a.)

Specifically, the court of appeals applied the test from *McGowan* v. *Maryland,* 366 U.S. 420 (1961), to the effect that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. at 425-26. (App., 5a.)

The petitioner contends that the *McGowan* test is inappropriate to this case because it is normally applied to economic interests, and because it does not protect state classifications which are not specifically adopted pursuant to a statute. Neither of these arguments has sufficient merit to justify an abandonment of well-settled principles regarding interpretation of the Equal Protection Clause. The rational basis or "any conceivable basis" test has been applied to cases concerning a broad spectrum of affected interests, and its application is not confined to economic interests alone. *See, e.g., McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969) (alleged discrimination in state absentee voting provision); *McGinnis* v. *Royster,* 410 U.S. 263 (1973) (alleged discrimination in state statute denying certain state prisoners good-time credit for parole eligibility). Instead, the rational basis test is appropriately used in any Equal Protection case which does not involve fundamental personal rights or inherently suspect distinction. *Rodriguez, supra,* 411 U.S. at 20; *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 313 (1976) (age classification in mandatory retirement statute for policemen is rationally related to protection of public by assuring preparedness of police); *City of New Orleans* v. *Dukes,* 427 U.S. 297, 304 (1976) (ordinance which prohibited sale of foodstuffs from pushcarts in French Quarter of New Orleans except by eight-year veterans of such businesses is rationally related to preservation of appearances and customs of community).

Although the exclusion of nonpublic schools from the respondent's membership is mandated by the respondent's constitution, and not by a state statute, it is undisputed that the respondent's acts were taken under color of state law. Were this not so, the petitioner would have been unable to bring this action under 42 *U.S.C.* § 1983. This being the case, the respondent's denial of the petitioner's membership application constitutes state action for all purposes, notwithstanding the absence of a statute on the subject. Accordingly, such action is constitutional under established Equal Protection analysis when, as here, it is related to legitimate state interests.

Having properly concluded that the respondent's exclusion of nonpublic schools from its membership was to be upheld if supported by a rational basis, the court of appeals then examined in detail the reasons presented by the respondent in support of its exclusionary rule. (App., 6a-11a.) These reasons, which comprise part of the record as statements made by League officials before the district court, were summarized by the court of appeals as follows:

> (1) League regulations are not sufficiently defined to determine the area from which private schools, many of which may now draw students from an unlimited geographical area, may draw eligible participants for League activities; (2) the lack of an attendance zone for private schools similar to that of public schools, each of which may draw students only from a specified geographical area, would make the transfer rule difficult to enforce and would give private school students an advan-

> tage not enjoyed by public school students; (3) students eligible to attend private schools could choose to attend private schools or their public school on the basis of athletic programs in violation of the spirit of the League.

(App., 6a.)

When due consideration is given to these reasons for the challenged rule, and to the full consideration given by the court of appeals to their factual underpinnings, it is apparent that the court of appeals correctly found the classification of nonpublic schools to be rationally related to a legitimate state objective. (App., 12a.)

Aside from the fact that this case was properly decided on the merits by the appellate court, the case does not require the exercise of the Supreme Court's extraordinary jurisdiction by means of a writ of certiorari. As set forth previously, there is substantial uniformity in the pertinent body of case law as to the appropriate standard of review in Equal Protection claims which do not concern fundamental rights or suspect classifications. The petitioner has made no showing of any kind which would warrant a reexamination of settled principles. In addition the effects of the court of appeals' decision are essentially confined to private high schools in Virginia. Only four state associations comparable to the respondent currently bar nonpublic schools from their membership. Thus, this case lacks the national scope and importance which is a vital consideration in the Court's exercise of its discretion to hear the case by writ of certiorari. Jurisdiction to review by certiorari should be exercised sparingly, and should be limited to cases of peculiar gravity and general importance, or to cases involving principles which suffer from a pervasive conflict of decisions. *Houston Oil Co.* v. *Goodrich,* 245 U.S. 440 (1918). None of these requisite factors is present in this case, and the petition should, therefore, be denied.

II.

The "Least Restrictive Alternative" Standard In Equal Protection Analysis Is Applicable Only Where State Action Has Affected Fundamental Rights, And Is, Therefore, Not Applicable To This Case.

The petitioner asserts that the respondent League could have met its articulated objectives by some means short of excluding nonpublic schools, and that, because such alternatives were available but were not implemented, the membership rule is constitutionally defective under the Equal Protection Clause. The petitioner further suggests that the court of appeals improperly failed to apply such a "least restrictive alternative" standard to the instant case.

The fallacy in these contentions is made clear by the petitioner's own recognition that the rationale of this standard has been applied to cases involving *fundamental* personal rights. More important to this case is the fact that the least restrictive alternative test is not employed in cases where the affected rights are *not* fundamental in nature. It has been held specifically by this Court that "only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative." *Rodriguez, supra,* 411 U.S. at 52; *cf. Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). Moreover, *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951), the case relied upon most heavily by the petitioner in this regard, was decided under the Commerce Clause and

thus has little relevance to determination of the proper standard to be applied in deciding an Equal Protection claim.

As discussed previously, this case does not involve a fundamental right under the Constitution. The "least restrictive alternative" standard, which is in reality only a component of the strict scrutiny test, is therefore inapplicable. The court of appeals recognized its function in cases of this kind when it stated:

> "The task of the courts in passing on the validity of a classification under the standard Equal Protection test is not to determine if it is the best way, or even a good way, of accomplishing a legitimate state objective. Our task is only to determine whether the classification makes sense in light of the purposes sought to be achieved; beyond that point the wisdom of the state must be allowed to prevail. Having found that the classification here challenged is rationally related to a legitimate state objective, this Court has completed its consideration of the matter."

(App., 12a.)

This succinct statement of the Court's role in Equal Protection cases such as the one at bar reflects the correctness of the appellate court's decision in upholding the constitutionality of the respondent's exclusion of nonpublic schools from its membership. A state's classifications which are designed to achieve legitimate purposes, do not violate the Equal Protection Clause merely because the practice in question is imperfect, or results in some inequality, or fails to attack every aspect of a problem. *Dandridge* v. *Williams,* 397 U.S. 474, 486, 487 (1970). Under such circumstances, the practice does not offend established rights under the

Equal Protection Clause if it is rationally based and free from invidious discrimination. *Id.* at 488. It is apparent from the facts of this case and the appellate court decision that the respondent's membership rule in question is rationally based and that it cannot be characterized as invidious discrimination. Accordingly, the actions of the court of appeals were in all respects proper, and its refusal to apply a "least restrictive alternative test" to this case does not constitute a valid reason for granting the petitioner's request for a writ of certiorari. The law pertaining to this standard is well settled in the respondent's favor.

III.

There Is Uniformity Among The Federal Circuits On The Proper Interpretation Of The "Clearly Erroneous" Scope Of Appellate Review, And The Decision Of The Court of Appeals Is Consistent With That Interpretation.

Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact made by a trial court are not to be set aside unless they are found to be "clearly erroneous." *Fed. R. Civ. P.* 52(a). The petitioner argues that a conflict exists among the circuits as to the construction of this guide for appellate review, and that the writ should be granted so as to bring about a resolution of this alleged inconsistency. It is further contended that most circuits have adopted a narrow scope of review under *Rule* 52(a), but that other circuits have created a disparity by construing the *Rule* as a permission for virtual de novo trials at the appellate level.

In reality, the alleged conflict does not exist, and there is virtual unanimity among the circuits on the implementation of *Rule* 52(a). While holding that the

findings of a trial court are never conclusive, the Supreme Court in *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948), held that a finding is "clearly erroneous" under *Rule* 52(a) when, although there is evidence to support it,

> "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Id. 333 U.S. at 395.

Thus, while a trial court's findings of fact are entitled to great weight, they are not binding on an appellate court which has determined that a mistake was committed at trial. The interpretation of *Rule* 52(a) as set forth in *United States Gypsum Co., supra,* has been approved more recently by the Supreme Court. *Commissioner* v. *Duberstein,* 363 U.S. 278, 289-291 (1960); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969). Furthermore, case law from each of the federal circuits demonstrates the uniform approval of the view that a trial court's findings of fact should be reversed if the appellate court is firmly convinced that a mistake was made by the lower court, notwithstanding the existence of some evidence in support of the trial court's findings. *E.g., Kargman* v. *Sullivan,* 552 F.2d 2 (1st Cir. 1977); *Getty Oil Co.* v. *S.S. Ponce de Leon,* 555 F.2d 328 (2nd Cir. 1977); *Ostapowicz* v. *Johnson Bronze Co.,* 541 F.2d 394 (3rd Cir. 1976); *Jones* v. *Pitt County Board of Education,* 528 F.2d 414 (4th Cir. 1975); *Dickens* v. *United States,* 545 F.2d 886 (5th Cir. 1977); *Yates Motor Co., Inc.* v. *C.I.R.,* 561 F.2d 15 (6th Cir. 1977); *Glenview Park District* v. *Melhus,* 540 F.2d 1321 (7th Cir. 1976); *Shull* v. *Dain, Kalman, & Quail, Inc.,* 561 F.2d 152 (8th Cir. 1977); *Anderson* v. *United States,* 555 F.2d 236 (9th Cir. 1977); *Mustang Fuel Corp.* v. *Youngstown Sheet & Tube,* 561 F.2d 202 (10th Cir. 1977); *Kinsey* v. *First Regional Securities, Inc.,* 557 F.2d 830 (D.C. Cir. 1977).

The record in the case at hand reveals with clarity the appellate court's firm conviction that the district court was mistaken in its finding that no proven factual basis substantiated the reasons given by the respondent for its exclusionary rule. Contrary to the petitioner's contention, the appellate court did not substitute speculation and hypothesizing in place of the district court's ruling. Rather, the court of appeals, on the basis of testimony given at trial by officials of the respondent association, found ample facts to support the stated reasons for the exclusion of private schools. (App., 6A.) In so doing, the appellate court set out to resolve what it regarded as a crucial mistake in the lower court's evaluation of the record before it. The appellate court's dissatisfaction with the district court's findings is further borne out by its statement that the trial court had "apparently ignored" perhaps the most important reason for the membership rule, as asserted by the respondent. (App., 8a.)

In short, the court of appeals found reversible error in the trial court's failure to recognize that sufficient evidence had been presented to establish a "conceivable basis" for the challenged rule. As discussed previously, such a minimal evidentiary foundation is all that is required to support the classification of the petitioner in this case. Having definitely found this mistake, the appellate court then properly corrected it in an opinion which sets forth its sound reasoning and its evidentiary support at some length. This result is entirely consist-

ent with the well-settled interpretation of *Rule* 52(a), as stated in *United States Gypsum Co., supra,* and in numerous subsequent cases in the federal courts. Accordingly, the propriety of the appellate court's decision, as well as the absence of conflict as to the appropriate scope of review, make the granting of a writ of certiorari in this case both unnecessary and inappropriate.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ JOHN A. DEZIO
John A. Dezio
Counsel for Respondent

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS.
FOURTH CIRCUIT.

No. 78-1064.

DENIS J. O'CONNELL HIGH SCHOOL
by its Board of Trustees, *Appellee,*

v.

THE VIRGINIA HIGH SCHOOL LEAGUE ET AL., *Appellants.*

Argued March 8, 1978.

Decided Aug. 7, 1978.

* * * * * * * * * * *

John A. Dezio, Charlottesville, Va., for appellants.

William G. McMurtrie, Falls Church, Va., for appellee.

Before BUTZNER, RUSSELL and WIDENER, Circuit Judges.

DONALD RUSSELL, Circuit Judge:

The Virginia High School League (the League) appeals from a judgment of the District Court enjoining the League from denying Denis J. O'Connell High School's (O'Connell) application for membership in the League and from barring O'Connell from competing in League-sponsored championship athletic contests.

O'Connell is a state-accredited private non-profit Catholic high school located in Arlington County, Virginia. In February of 1977, O'Connell applied for admission to the Virginia High School League, Northern Region. The application was denied because the League's Constitution limits membership to public high schools.[1]

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[1] Section 8 (Membership) of the present League Constitution provides, in relevant part:

"8-1-1 Eligibility-Accredited state public high schools in Virginia shall be eligible for membership in the League. Membership shall be renewable annually."

The League is an unincorporated association of public high schools in Virginia under the sponsorship of the School of Continuing Education of the University of Virginia. With only one exception, every public high school in Virginia belongs to the League. In 1913 when the League was founded, its Constitution included both public and private secondary schools without distinction, but in 1925 the Constitution was changed so that only public high schools could be members, and that limitation remains today. The League is maintained by public funds derived in part from the University of Virginia, in part from local school boards, and in part from gate receipts from League-sponsored tournaments.

The League regulates, controls, and governs all athletic, literary and debating contests between and among its member schools. Private schools are invited by the League to participate as a distinct class in certain statewide tournaments, such as those involving tennis, debating and speaking. However, the private schools are excluded altogether from League sponsored tournaments involving such "major" sports as football, basketball and baseball.

O'Connell brought suit against the League pursuant to Section 1983, 42 U.S.C. and its jurisdictional counterpart, Section 1343(3), 28 U.S.C.,[2] alleging in its complaint that the League's refusal to admit O'Connell on the sole basis that it is a private school is an arbitrary classification in violation of the Equal Protection Clause of the Fourteenth Amendment. The complaint further charged that, as a result of this exclusion, O'Connell's students choice of private education denies them the right to compete on a tournament level in sports such as football, basketball and baseball, thus placing them in a less favorable competitive position than public high school students to receive athletic scholarships, professional bonuses, and other benefits that accrue to gifted athletes. The League submitted an answer denying the essential allegations of the complaint. Following the Court's denial of the League's Motion to Dismiss and Motion for Summary Judgment, the parties entered into a formal stipulation which was filed with the Court prior to trial. The stipulation stated, *inter alia*, that action by the League in supervising interscholastic competition is taken under color of state law and constitutes state action within the meaning of Section 1983, 42 U.S.C.

[2] O'Connell also brought suit under the Sherman Anti-Trust Act, alleging that the 27 Northern Region Principals had engaged in an illegal group boycott of O'Connell by declining to admit it into the League. This claim was abandoned at trial and not raised upon appeal.

At trial, the League presented three basic arguments in defense of its policy of exclusion. First, the League asserted that because O'Connell had not been deprived of any federally protected right, there was no federal question presented so as to support federal jurisdiction alleged to be founded on 28 U.S.C. § 1343. Second, the League argued that its limitation of membership to public schools is rationally related to the League's interest in enforcing its eligibility rules concerning transfer students. The League presented testimony to the effect that, because public schools draw students only from strictly defined zones whereas private schools are not so limited, the League's transfer rules would be difficult to enforce with respect to private schools. Finally, the League argued that the admission of O'Connell, a parochial school, into the League would violate the Establishment Clause of the First Amendment. The Court held that (1) the question whether participation in the League's athletic program can be characterized as a right is not determinative of the Constitutional validity of the League's classification, (2) there is nothing in the record to support the asserted bases for the League's exclusion of private schools from League membership, and (3) the activities of the League neither advances nor inhibit religion, and any financial benefits supplied indirectly by the League to O'Connell in the form of

surplus proceeds from League-sponsored championship games would not constitute excessive governmental entanglement with religion so as to violate the Establishment Clause. Thus, because the exclusion of O'Connell from the League lacked a rational basis in violation of the Fourteenth Amendment, and because the inclusion of O'Connell in the League would not violate the First Amendment, the Court enjoined the League from denying O'Connell membership.

On appeal, the League first contends that the District Court erred in holding that jurisdiction exists under 28 U.S.C. § 1343. Section 1343 grants a District Court jurisdiction to redress a deprivation, under color of state law, of a right or privilege secured by the Constitution or federal law. The League's contention is essentially as follows: Since neither education, nor participation in interscholastic competition, nor the speculative possibility of acquiring an athletic scholarship, professional bonus or other emolument are rights secured by the Constitution or federal law, 28 U.S.C. § 1343 did not provide the District Court with jurisdiction over O'Connell's claim. Admittedly, education is not a fundamental right under the Constitution, *San Antonio Independent School District v. Rodriguez* (1973), 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16, and, of course, neither is participation in interscholastic athletics such a right. *Mitchell v. Louisiana High School Athletic Association* (5th Cir. 1970), 430 F.2d 1155, 1158. Nor is the speculative possibility of acquiring an athletic scholarship or professional bonus a federally protected property right. *Parish v. National Collegiate Athletic Association* (5th Cir. 1975), 506 F.2d 1028, 1034, n. 17. The right allegedly abridged, however, is not the right to education or the right to participate in interscholastic athletics; rather, the alleged abridgement is of the right of private school students to be treated similarly as public school students with regard to participation in interscholastic athletics where there is no rational basis for treating the two classes of

students differently. That is, O'Connell claims that its students have been denied their right to an equal opportunity to compete in interscholastic competition. A claimed denial of equal protection by state action arises under the Constitution and would normally be within the District Court's jurisdiction under Section 1343, unless unsubstantial or frivolous. *Baker v. Carr* (1962), 369 U.S. 186, 199, 82 S.Ct. 691, 7 L.Ed.2d 663; *Mitchell v. Louisiana High School Athletic Association, supra,* 430 F.2d at 1158. Under the facts of the present case, we cannot say that the claimed denial of equal protection lacks substance. Therefore, the District Court properly took jurisdiction of the claim pursuant to 28 U.SC.. § 1343.[3]

The League next contends that the District Court erred in holding that there is no rational basis for the provision of the League's Constitution limiting membership to public schools. We agree.

Where, as here, there is no fundamental right or suspect classification involved, the test to determine the validity of state legislation is whether the statutory classification bears some rational relationship to a legitimate state purpose. *San Antonio Independent School District v. Rodriguez, supra,* 411 U.S. at 17, 93 S.Ct. 1278; *Weber v. Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, 172, 92 S.Ct. 1400, 31 L.Ed.2d 768; *See generally Developments in the Law—Equal Protection,* 82 *Harv.L.Rev.* 1065, 1076-1087 (1969). Furthermore, "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland* (1961), 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1105, 6 L.Ed.2d 393.

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[3] *See Chabert v. Louisiana High School Athletic Association* (La. App. 1975), 312 So.2d 343, *aff'd,* 323 So.2d 774 (La. 1975).

The reasons for the League's exclusion of private schools, as established by the statements of two League officials, are as follows: (1) League regulations are not sufficiently defined to determine the area from which private schools, many of which may now draw students from an unlimited geographical area, may draw eligible participants for League activities; (2) the lack of an attendance zone for private schools similar to that of public schools, each of which may draw students only from a specified geographical area, would make the transfer rule difficult to enforce and would give private school students an advantage not enjoyed by public school students; (3) students eligible to attend private schools could choose to attend private schools or their public school on the basis of athletic programs in violation of the spirit of the League. The transfer rule cited by the League officials states, essentially, that when a student transfers from one high school to another without a corresponding change in district residence by his parents, the student is ineligible to participate in interscholastic competition for one semester at his new school.

In its Memorandum Opinion, the District Court stated that "[t]he only bases asserted by the League for excluding non-public high schools from League membership are their ability to draw students from a larger geographical area than the public high schools and the difficulty of enforcing the eligibility rules for transfer students." The Court found that "[n]either assertion is supported by the record—and no reason was suggested why the League's rules could not be uniformly applied to both private and public high schools."

The Court's finding that there is no support in the record for the League's contention that private schools can draw students from a larger geographical area than public schools is based upon the failure of the League to introduce actual evidence to that effect. However, it is well-

known that many private schools in Virginia suffer no geographical limitation with respect to the areas from which they may draw students. Furthermore, even assuming that there are some Virginia private schools which do draw from strictly defined areas, these schools unlike their public counterparts, are not so limited by state law and could therefore at any time decide to modify or abolish their self-imposed drawing restrictions and recruit students from anywhere. And even assuming that some of these schools chose to continue drawing from strictly defined areas—an assumption the League is no obligated to make—these areas would overlap with the areas from which public schools can draw. Therefore, because the actual and potential disparity in drawing area between public schools and private schools is beyond doubt, the District Court should have given credence to the League's assertion that public and private schools lack similar attendance zones.

Given the lack of specifically defined drawing areas with respect to many private schools, it is obvious that the admission into the League of private schools would create difficulties in the enforcement of the transfer rule. Although the difficulty of applying the rule to students transferring from private to public schools might not be affected,[4] surely additional difficulties would arise in applying the rule to students transferring from either private or public schools to "zoneless" private schools. Since the school to which the student transfers would be lacking a district in which his parents could establish residence, it

[4] A Note to § 28-6-2 of the Rules and Regulations of the League provides that the Transfer Rule applies equally "to a transfer from a private school to a public school as to a transfer from one public school to another." Thus, whether or not private schools become League members, the parents of a student transferring from a private to a public school would presumably need to reside in the public school district following their child's transfer in order for the child to be immediately eligible to participate in the public school's athletic programs.

would seem that any student transferring to a "zoneless" private school would necessarily be ineligible to participate in that school's athletic programs for one semester—even if his parents moved next door to the school. Thus, any student transferring to a "zoneless" private school would be victimized by the application of the transfer rule to a situation that it was never meant to cover.

In addition to the problems created by the application of the transfer rule to private schools lacking attendance zones, the League asserted another basis, apparently ignored by the District Court, for restricting its membership to public schools. A League official stated that if private schools became members, students eligible to attend such private schools could choose to attend those schools or their public school on the basis of athletic programs "in violation of the spirit of the League." Although there was no elaboration by the League official as to exactly what this "spirit" is, an examination of the League Constitution and the League Rules and Regulations shows that the placing of great emphasis by a student upon athletic programs in deciding what school to attend does indeed violate "the spirit of the League." Section 6 of the League Constitution states that the object of the League is "to foster among the public high schools of Virginia a broad program of supervised competitions and desirable school activities *as an aid in the total education of pupils.*" (emphasis added) Rules and Regulations Section 26-1-1 states that their purpose is "*to protect and preserve the educational values inherent in* [*interschool*] *activities.*" (emphasis added) Obviously, the transfer of a student from one school to another solely to participate on the athletic teams of the latter school does not come within the "spirit" of these two sections. More specifically, Section 27-10-1 (Proselyting Rules) states: "*No member school or group of individuals representing the school shall subject a student from another school to undue influence by encouraging him to transfer from one school to another for League activities.*"

(emphasis in text) And Section 28-8-3(8) states that "[a]ny student who accepts material or financial inducement to attend a school for the purpose of engaging in athletics, regardless of the source of that material or financial inducement, shall be ineligible" to represent his school in any interschool athletic contest. The sections quoted above serve to illustrate the League's concern that students not be subjected to pressures by coaches, fan and other interested parties to attend one school over another. And, of course, the objective of the transfer rule, which makes a student ineligible to compete for one semester where his move to a new school is not accompanied by a corresponding change in residence by his parents, is basically the same—to deter those who would pressure a student to transfer and to deter the student from succumbing to such pressures by preventing him from becoming immediately eligible to compete at his new school.

The concerns addressed by the above mentioned sections have been recognized by other courts as problems that need to be addressed. In rejecting an attack upon the constitutional validity of a transfer rule imposed by the Louisiana High School Athletic Association, a federal District Court stated that "[t]he transfer rule was adopted to prevent recruiting of school children by overzealous athletic coaches, fans, and school faculty. . . . All parties to this suit agree that this sort of recruiting of school children to engage in athletic competition may be considered harmful by the state, and that it may take steps to prevent this harm." *Walsh v. Louisiana High School Athletic Ass'n.* (E.D.La. 1977), 428 F.Supp. 1261, 1264. In another case involving a challenge to the application of a transfer rule, the Louisiana Court of Appeals stated:

> "Past history, and especially recent events, have shown the unconscionable actions to which some individuals will resort in order to insure themselves of a superior athletic program. Illegal recruiting of promis-

> ing young athletes is the gravamen of this recurring problem. Not only is the atmosphere of fair competition irreparably clouded, but many times the lives of the athletes themselves in that athletics becomes primary and academicism secondary under the overbearing scrutiny of those who would entice through illicit means. It is unarguable that any state has an interest in prohibiting such occurrences in its high schools. One means towards such a prohibition is to impede those who would be the innocent objects of illegality from being immediately profitable to the perpetrators. Certainly the advantages of such undisciplined activity are considerably lessened by the application of the rule complained of herein." *Chabert v. Louisiana High School Athletic Association* (La.App. 1975), 312 So.2d 343, 346.

The language of these two cases makes it clear that the State is justified in taking any reasonable step to prevent actual or potential abuse of student athletes by those persons who would recruit these students for their athletic ability. Certainly, therefore, reasonable measures taken to reduce or remove the possible temptation to make a choice of schools on the basis of their respective athletic programs are justified.

At present a student who desires to engage in League-sponsored tournaments is not exposed to a potentially tempting choice of schools; of the public schools, he is usually eligible to attend only the one serving the district in which he lives, and private schools are ineligible for League tournament competition. If, however, private schools were admitted to the League, a student eligible to attend such schools could choose to attend any of them or to attend his public school, thus exposing himself to the potential pressures that the League seeks to forestall, and perhaps basing his ultimate choice on athletic considerations in violation of the above mentioned "League spirit."

Nor would the transfer rule be effective to deal with such a situation, for that rule applies only to transfers from one secondary school to another, and not to the initial choice of a secondary school. Moreover, the transfer rule would also be inadequate to deal with the situation where a student's residence falls within the district of a private school as well as that of his public school. In such a case the student could presumably transfer back and forth between the two schools without suffering any ineligibility—again, exposing himself to those pressures—and temptations against which the League attempts to protect its students.

Against this background, the League's exclusion of private schools must be viewed as one of several reasonable steps taken to combat the serious problem of adolescent students being subjected to and perhaps succumbing to pressures to attend one school over another on the basis of athletic considerations. That there was no evidence presented to establish the existence of such a problem in Virginia is not important, for not only do several provisions of the League's Constitution and Rules and Regulations show clearly the League's concern with the possible occurrence of such activities, but experience elsewhere has shown that this is indeed a problem which needs to be addressed.[5] And "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[6]

Also inconsequential is the fact that there may be means of addressing the problem other than by blanket exclusion of private schools which may result in less hardship to students at private schools such as O'Connell. The task of the courts in passing on the validity of a classification under the standard Equal Protection test is not to de-

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[5] *Walsh, supra,* 428 F.Supp. 1261.

[6] *McGowan v. Maryland, supra,* 366 U.S. at 426, 81 S.Ct. at 1105.

termine if it is the best way, or even a good way, of accomplishing a legitimate state objective. Our task is only to determine whether the classification makes sense in light of the purpose sought to be achieved; beyond that point the wisdom of the State must be allowed to prevail. Having found that the classification here challenged is rationally related to a legitimate State objective, this Court has completed its consideration of the matter.

Because we find that the League may constitutionally exclude private schools from League membership, we do not address League arguments concerning burden of proof, nor do we address the League contention that the admission of a private sectarian school such as O'Connell would violate the Establishment Clause of the First Amendment.

Accordingly, the judgment below is reversed.

REVERSED.

BUTZNER, Circuit Judge, dissenting:

I agree that the district court properly took jurisdiction in this case, but I would affirm the judgment.

Denis J. O'Connell High School brought this action because its exclusion from the Virginia High School League handicaps its students who compete for athletic scholarships and other benefits available to talented athletes. To explain its exclusion of private and parochial schools, the League cited the ability of these schools to draw students from a wider geographic area than public schools and the difficulty in enforcing the eligibility rules for transfer students.

Quite properly, the district court rejected these arguments. The geographic areas from which public schools draw vary widely in size and population. There is ample evidence to support the district court's determination that the League's asserted justifications for excluding private and parochial schools lack a factual foundation. Since this

finding is not clearly erroneous, it is binding on us. Fed. R.Civ.P. 52(a).

Moreover, the cases cited to support the League's policy concern no-transfer rules within an association including public, private, and parochial schools. *See Walsh v. Louisiana High School Athletic Ass'n.*, 428 F.Supp. 1261 (E.D. La.1977); *Chabert v. Louisiana High School Athletic Ass'n.*, 312 So.2d 343 (La.App.), *aff'd* 323 So.2d 774 (La.1975). No case approving a policy excluding non-public schools from an athletic association has been cited. The fact that the Louisiana association operates and enforces a no-transfer rule successfully without excluding private and parochial schools belies the League's argument.

Because the record discloses no factual basis for concluding that the League's exclusionary rule bears some rational relationship to the state's purpose, I am persuaded that the district court correctly decided that the rule violated the equal protection clause. *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 40, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973). The district court also properly held that admission of Denis J. O'Connell High School to the League would not violate the establishment clause of the first amendment. *See Wolman v. Walter*, 433 U.S. 229, 235-36, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977). Consequently, I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 77-412-A

BISHOP DENIS J. O'CONNELL HIGH SCHOOL, ETC.,
Plaintiff

v.

THE VIRGINIA HIGH SCHOOL LEAGUE, ET AL., *Defendants*

MEMORANDUM OPINION

The plaintiff, Bishop Denis J. O'Connell High School, brought this suit against The Virginia High School League and the named high school principals for damages and injunctive relief under 15 U.S.C. § 1 and 42 U.S.C. § 1983.

O'Connell claims that the League has unlawfully prohibited its students from participating in League-sponsored district, regional and state championships in those sports which draw large gate receipts and public recognition solely on the basis of its status as a private sectarian high school.

The high school principals have been dropped as party defendants and the Sherman Act claim has been abandoned.

Jurisdiction and venue are not questioned, and the League now concedes that its actions in the premises were taken under color of state law within the meaning of 42 U.S.C. § 1983.

The material facts are not in dispute—most were stipulated.

The Bishop Denis J. O'Connell High School is a state-accredited private non-profit Catholic high school located in Arlington County, Virginia, consisting of some 1,600 students, most of whom are Roman Catholics.

O'Connell applied for admission to The Virginia High School League, Northern Region, in February of 1977. The application was denied because the League's constitution limits membership to public schools.

Membership in the League originally included both public and private secondary high schools—Membership since 1925 has been limited to public schools.

The Virginia High School League is an unincorporated association of public high schools in the Commonwealth of Virginia under the sponsorship of the School of Continuing Education of the University of Virginia.

The League is maintained by public funds derived in part from the University of Virginia, in part from local school boards, and in part from gate receipts from League-sponsored district, regional and state athletic tournaments.

It regulates, governs and controls all athletic, literary and debating contests between and among its member schools—It permits non-public schools to compete on an equal basis with public schools in certain sports and literary contests for statewide prizes, but prohibits them from competing in League-sponsored championship football, basketball and baseball games.

O'Connell claims that its exclusion from League membership places its students who have chosen a non-public school education in a less favorable position than those who have chosen a public school education to receive athletic scholarships and the other benefits that accrue to gifted athletes, and that the League's distinction between public and non-public schools constitutes an arbitrary classification violative of the Equal Protection Clause of the Fourteenth Amendment.

Tournament competition is the lifeblood of gifted athletes—Barring O'Connell from competing in League-sponsored championship games denies its students the equal protection of the laws.

Athletics were recognized as part of the educational process and were subject to the Equal Protection Clause of the Civil Rights Acts. See 15 Am.Jr.2d § 88 and the cases cited in fn. 48.

The League argues that O'Connell has not been deprived of any federally protected right and that a rational basis exists for limiting its memberships to public schools.

The question of whether participation in the Virginia high school athletic program can be characterized as a right is not determinative of the validity of the League's classification. See Graham v. Richardson. 403 U.S. 365, 374 (1971).

Having been duly licensed and accredited by the State of Virginia, O'Connell cannot be denied benefits granted other Virginia schools unless the classification upon which the denial is based is founded upon some difference rationally related to a legitimate government interest.

The only bases asserted by the League for excluding non-public high schools from League membership are their ability to draw students from a larger geographical area than the public high schools and the difficulty of enforcing the eligibility rules for transfer students.

Neither assertion is supported by the record—and no reason was suggested why the League's rules could not be uniformly applied to both private and public high schools.

Therefore this Court finds that the League has failed to establish a rational basis for limiting League membership to public high schools.

Although not asserted in its answer or motion to dismiss, the League now argues that the admission of O'Connell would violate the Establishment Clause of the First Amendment to the Constitution of the United States.

This belated argument is without support in fact or law.

The Virginia High School League was created solely for the purpose of fostering among the public high schools of Virginia a broad program of supervised competitions and desirable school activities as an aid in the total education of pupils—Its activities neither advance nor inhibit religion.

Notre Dame and other nationally known Catholic schools have long competed with the United States military academies and many state universities and has shared in the gate receipts and other benefits derived from such athletic competitions—Many Catholic and other sectarian and private high schools in most of the States compete with the public high schools in state athletic championship contests —and no one, as far as we know, has ever claimed that such competitions are prohibited by the Constitution of the United States.

All athletic contests between high schools, colleges and even in the professional ranks are now conducted without regard to race, creed, color or national origin of the players, coaches and schools.

Practically all of the proceeds from League-sponsored championship games over and above the actual expenses go to maintain the League—Only on rare occasions has the total income been sufficint to permit a little to trickle down to the participating schools.

Even though the benefits thus supplied indirectly by the League to its members are paid for in part by government funds, such contributions do not foster an excessive governmental entanglement with religion.

As was stated by Mr. Justice Powell in Wolman v. Walter, —— U.S. —— (No. 76-496, June 24, 1977):

> ". . . This Court [Supreme Court of the United States] has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them."

The Bishop Denis J. O'Connell High School is a well known Northern Virginia Catholic-supported institution—and the record here made clearly supports the inference that it was denied membership in the League solely on the basis of its status as a private sectarian high school. No other reasonable inference is supported by the record, and no other explanation has been offered.

It is conceded that O'Connell otherwise qualifies for membership in the League.

Therefore The Virginia High School League will be enjoined from denying Bishop Denis J. O'Connell High School's application for membership in the League and from barring O'Connell from competing in League-sponsored championship athletic contests.

Counsel for the plaintiff will prepare an appropriate order in accordance with this memorandum opinion, submit is to counsel for the defendant for approval as to form, and then to the Court for entry.

The Clerk will send a copy of this memorandum opinion to all counsel of record.

/s/ ILLEGIBLE

United States Senior District Judge

October 28, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1064

DENIS J. O'CONNELL HIGH SCHOOL,
BY ITS BOARD OF TRUSTEES, *Appellee,*

v.

THE VIRGINIA HIGH SCHOOL LEAGUE; WILLIAM LADSON, PRINCIPAL; R. DON FORD, PRINCIPAL; MS. DORIS TORRICE, PRINCIPAL; THOMAS HYER, PRINCIPAL; EMORY CHESLEY, PRINCIPAL; JAMES G. FINCH, PRINCIPAL; JOHN W. ALWOOD, PRINCIPAL; ROBERT E. PHIPPS, PRINCIPAL; ROY VOLRATH, PRINCIPAL; CLARENCE DRAYER, PRINCIPAL; DR. JAMES WILSON, PRINCIPAL; JOHN T. BROADDUS, PRINCIPAL; RICHARD JOHNSON, PRINCIPAL; AND T. PAGE JOHNSON, PRINCIPAL,
Appellants.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

Filed August 7, 1978.

WILLIAM K. SLATE, II, Clerk.

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1064

DENIS J. O'CONNELL HIGH SCHOOL,
BY ITS BOARD OF TRUSTEES, *Appellee,*

v.

THE VIRGINIA HIGH SCHOOL LEAGUE; WILLIAM LADSON, PRINCIPAL; R. DON FORD, PRINCIPAL; MS. DORIS TORRICE, PRINCIPAL; THOMAS HYER, PRINCIPAL; EMORY CHESLEY, PRINCIPAL; JAMES G. FINCH, PRINCIPAL; JOHN W. ALWOOD, PRINCIPAL; ROBERT E. PHIPPS, PRINCIPAL; ROY VOLRATH, PRINCIPAL; CLARENCE DRAYER, PRINCIPAL; DR. JAMES WILSON, PRINCIPAL; JOHN T. BROADDUS, PRINCIPAL; RICHARD JOHNSON, PRINCIPAL; AND T. PAGE JOHNSON, PRINCIPAL,
Appellants.

Order

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell with the concurrence of Judge Widener. Judge Butzner dissents.

Filed October 4, 1978.

FOR THE COURT,

/s/ WILLIAM K. SLATE, II
Clerk